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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Appellants,

v.

THE STATE OF MISSISSIPPI, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Southern District of Mississippi

Brief of Hawaii Sugar Planters' Association, Amicus Curiae

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QUESTIONS PRESENTED

Does Congress have the power under the Commerce Clause and foreign affairs power to enact Title I, Section 210 of Title II, and Title III of the Public Utility Regulatory Policies Act of 1978?

Are these statutory enactments consistent with the principle of state sovereignty embodied in the Tenth Amendment?

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INTEREST OF AMICUS CURIAE

The Hawaiian Sugar Planters' Association (HSPA) is a non-profit association organized under the laws of the State of Hawaii. The HSPA's member companies grow and process sugarcane on the islands of Oahu, Maui, Hawaii and Kauai. The processing of sugarcane in various sugar mills produces a fibrous, residuous material called "bagasse" which is used as direct composition fuel

in the generation of steam and electricity for processing operations. Electric energy in excess of needs for sugar operations is being made available to electric utilities. These sugar mills are "qualifying cogeneration facilities" as that term is used in Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. § 796 and § 824a-3). The HSPA is directly concerned with the constitutionality of Section 210 of PURPA and is filing this brief in support of the Appellants. Written consents of the parties have been filed with this brief. Although the principles outlined in this brief are also applicable to Title I and Title III of PURPA, primary attention has been directed to the validity of Section 210 of Title II.

A central purpose of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 *et seq.* (PURPA), is to increase the efficient use of fuel resources by electric utilities, and thus to preserve our national security by reducing our dependence on imported petroleum. (*See* PURPA, §§ 2 and 101(2); 16 U.S.C. §§ 2601 and 2611(2)). Section 210 (16 U.S.C. § 824a-3) is designed to accomplish that goal by removing the obstacles that prevented the development and efficient use of bagasse and other renewable domestic energy resources or fuel sources for the generation of electricity to meet domestic needs. As will be explained (See below, Argument, Section VI), PURPA has already had a substantial, beneficial impact in Hawaii in encouraging private companies to invest in the capital infrastructure necessary to develop and employ these renewable resources efficiently.

Reducing our dependence on imported petroleum is clearly a national goal of substantial importance, related directly to our national security and economic stability. (See below, Description of the Statute.) Congress acted carefully and responsibly in enacting PURPA to remove those obstacles that were inhibiting the

development of alternative energy resources, while leaving the states as much discretion as possible to deal with local problems that may require local solutions. The HSPA feels strongly that Congress has legislated within its constitutionally delegated power and that this important statute will assist our nation in reducing its dependence on imported petroleum.

STATEMENT OF THE CASE

Appellees brought this action in the United States District Court for the Southern District of Mississippi. On February 27, 1981, after all parties had moved for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the District Judge ruled that Title I, Section 210 of Title II, and Title III of PURPA are unconstitutional and void. Appellants filed notice of appeal to this Court on March 13, 1981, basing jurisdiction on 28 U.S.C. § 1252. This Court noted probable jurisdiction on June 15, 1981, 49 U.S.L.W. 3930.

DESCRIPTION OF THE STATUTE

During its consideration of PURPA, the House of Representatives' Ad Hoc Committee on Energy stated explicitly that: "The fundamental problem for U.S. energy policy is the insecurity of its oil supply." H.R. Rep. No. 95-543, 95th Cong., 2nd Sess. 5 (1978). This problem has not only caused major energy supply dislocations within the United States, but also has created serious tensions in our relations with other countries.

> *As our energy appetite has grown, so has our dependence on energy supplies outside the borders of the United States.* In 1970, for example, this country imported 2.4 million barrels of oil per day (23.3 percent of our total petroleum demands). Our projected demand of imported petroleum in the year 1977 is 8.9 million barrels per day or 46.6 percent total consumption of oil—*a precise doubling of import dependence over 7 short . . . years.*

(H.R. Rep. No. 95-496-Pt. IV, 95th Cong., 2nd Sess. 5 (1978)) (emphasis added). This dependence on imported petroleum meant that billions of dollars were leaving the United States, contributing to "a significant imbalance in the global balance of payments position." Statement by William D. Nordhaus, of the Council of Economic Advisors to the House Interstate and Foreign Commerce Committee's Subcommittee on Energy and Power, June 1, 1977, H.R. Rep. No. 95-543, *supra*, at 73. Congress clearly feared that this dependence on imported petroleum and the balance of payment deficit would increase: "Our reliance on imported oil is expected to increase dramatically if present practices and policies are continued." *Id.* at 5. Prices were predicted to continue to rise and supplies would tighten:

> Sudden disruptive price increases, accompanied by arbitrary curtailments of supply, will generate *shocks to the national security and economic stability of each oil importing country.* This is a development that each country should strive to avoid.
>
> The choice for the United States is evident: *We must begin now, while there still is time to make adjustments, to change the way Americans use energy* and avoid the disruption that could be suddenly thrust upon us from external sources . . . .

(*Id.* at 6) (emphasis added). If we did not cut back on our imports of foreign petroleum, said the House Ad Hoc Committee on Energy, further increases "would greatly strain our foreign policy and could do considerable damage to our economy." *Id.* at 5.

PURPA is one of the responses of Congress to this pressing national need, and it is designed carefully to encourage the development of domestic alternative energy resources by removing the obstacles to their development. The House Ad Hoc Committee on Energy described the package of legislation that included PURPA in strong terms: "This legislation is essential to our nation's immediate future." *Id.* at 3.

A major purpose of PURPA is "to encourage the optimization of the efficiency of use of facilities and resources by electric utilities . . . ." PURPA 101(2), 16 U.S.C. 2611(2); S. Rep. No. 95-442, 95th Cong., 2nd Sess. 6 (1978). Recognizing that the generation, transmission and distribution of electric power consume over one-fourth of the energy resources used in the United States (S. Rep. No. 95-442, *supra,* at 7), Congress sought to develop a program whereby the production of electric power would be less dependent on fuel oil. Congress determined that a viable alternative source of electric energy is cogeneration, which is the simultaneous or sequential production of both steam or heat and electricity. *Id.* at 21; PURPA § 201. Industries and electric utilities in the United States have been wasting enormous amounts of heat that could have been used productively; in 1975, the heat that was wasted was the equivalent of over 7 million barrels of oil per day. S. Rep. No. 95-442, *supra,* at 21.

Cogeneration had provided 15 percent of this nation's energy as recently as 1950, but as of 1978 it contributed only 4 percent. *Id.* One reason for its decline has been that "a variety of institutional barriers impede its development." *Id.* Section 210 of PURPA seeks "to remove these barriers by assuring that industrial firms generating electricity receive fair rates from utilities for both the surplus power they would sell and the backup power they would buy." *Id.* In addition, Section 210 states that qualified cogeneration facilities may be exempted by rule of the Federal Energy Regulatory Commission (FERC) from the Federal Power Act, from the Public Utility Holding Company Act, and from state laws and regulations respecting rates of electric utilities and financial and organizational matters.

Section 201 of PURPA also identifies "small power production facilities," which generate electric energy from "biomass, waste, renewable resources, geothermal resources, or any combination thereof." PURPA § 201; Federal Power Act § 3(18)(A), 16

U.S.C. § 796(18)(A). These facilities, in other words, produce electric energy without using petroleum.

Section 210 of PURPA frees both "qualifying small power production facilities" and "qualifying cogeneration facilities" from discriminatory high rates for back-up power and from utility-type regulation. In addition, under certain circumstances this Section requires the public utility to buy electric energy and capacity from a qualifying facility at a rate equivalent to the incremental cost of the energy or capacity which, but for the purchase, the utility would incur.

A guaranteed right to sell at a guaranteed rate provides a major incentive for companies to develop alternative energy resources and the accompanying facilities necessary to make electric energy available to utilities. As we will discuss below (See Argument, Section VI), because of PURPA members of HSPA have already been investing substantial capital to achieve efficiencies and other increase electric energy production. PURPA, therefore, shows substantial promise of achieving its goal of reducing our dependence on imported petroleum.

PURPA also preserves as much freedom for the state regulatory agencies as is consistent with meeting these pressing national needs. Although Section 210 of PURPA essentially preempts state regulation of qualifying facilities as utility, the statute is drafted carefully to keep interference with other state regulations at a minimum and to permit as much state discretion as is consistent with the federal policies.

SUMMARY OF ARGUMENT

PURPA was enacted by Congress to achieve the major national goal of reducing our dependence on imported fuel oil in order to preserve our national security and to stabilize our economy. The statute regulates activities that without question substantially affect interstate and foreign commerce in energy and fuel oil.

Further the statute selects regulatory methods that are rationally related to its stated goals and in Hawaii has already stimulated major capital investments to develop alternative energy sources. Although the statute displaces the regulatory power of the states in certain specific areas related to the attainment of the national goals, it leaves the states with considerable discretion and leaves the state regulatory machinery intact to the maximum extent possible. The statute neither threatens any matter that is essential to a state's sovereign integrity, nor does it intrude into an area that is a traditional state governmental function. Instead, it confronts a problem of national concern that was beyond the power of any single state to solve and provide a set of solutions that will stimulate our economy, strengthen our national independence, and permit all our states to prosper.

ARGUMENT

Congress Clearly Has Constitutional Authority Under the Commerce Clause (Art. I, Sec. 8, Cl. 3) and Its Foreign Affairs Power to Enact a Comprehensive Statute Such as the Public Utility Regulatory Policies Act of 1978 (PURPA) to Promote Energy Conservation and the Use of Energy Sources Other Than Fuel Oil in Order to Reduce Our National Dependence on Imported Fuel Oil.

I. THE COMMERCE CLAUSE POWER.

This Court has articulated clear standards to explain the law governing Congressional exercise of power under the Commerce Clause, and these standards have been most recently reaffirmed in the cases of *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, ... U.S. ...., 49 U.S.L.W. 4654 (June 15, 1981) and *Hodel v. Indiana*, ... U.S. ....., 49 U.S.L.W. 4667 (June 15, 1981). Congressional statutes based on the Commerce Clause are constitutional unless (1) "there is no rational basis for a congressional finding that the regulated activity affects interstate commerce" (*Hodel v. Indiana, supra*, 49 U.S.L.W. at 4669), or (2) "there is

no reasonable connection between the regulatory means selected and the asserted ends" (*Id.; see also Hodel v. Virginia Surface Mining & Reclamation Assoc., supra,* 49 U.S.L.W. at 4656-57). These standards have developed in a long series of earlier cases. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937); *United States v. Darby,* 312 U.S. 100, 121 (1941); *United States v. Wrightwood Dairy Co.,* 315 U.S. 110, 119 (1942); *Wickard v. Filburn,* 317 U.S. 111, 127-28 (1942); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258, 262 (1964); *Katzenbach v. McClung,* 379 U.S. 294, 303-04 (1964); *Perez v. United States,* 402 U.S. 146, 1954-56 (1971); *Fry v. United States,* 421 U.S. 542, 547 (1975).

More particularly, in determining what is interstate commerce, it has been made clear that the commerce power extends not only to "the use of channels of interstate or foreign commerce" and "to protection of the instrumentalities of interstate commerce . . . or persons or things in commerce," but also to "activities affecting commerce." *Perez v. United States, supra,* 402 U.S. at 150. This Court has upheld numerous Congressional statutes regulating purely intrastate activity where the cumulative effect of such intrastate activity affects interstate commerce. *See, e.g., NLRB v. Jones & Laughlin Steel Corp., supra; NLRB v. Friedman-Harry Marks Clothing Co.,* 301 U.S. 58 (1937); *United States v. Darby, supra,* 312 U.S. at 118; *Wickard v. Filburn, supra,* 317 U.S. at 125; *Heart of Atlanta Motel, Inc. v. United States, supra; Katzenbach v. McClung, supra.* If Congress determines that a particular activity affects interestate or foreign commerce, then the reviewing court must decide simply whether the Congressional determination is rational and whether the regulatory approach is reasonably designed to achieve Congress's purposes.

Under these standards, PURPA is clearly within the Commerce Clause power of Congress. First, Congress had a rational basis for its finding that the "regulated activities"— the terms and

conditions of the sale of electric energy generated through the use of non-fossil fuels—affect commerce. The production of energy is an essential component of commerce and a necessary prerequisite for it; certainly it has a "substantial" effect on commerce. The terms and conditions for the sale and purchase of energy in turn have a substantial impact on whether investors will finance the development of alternative energy sources which will reduce our dependence on imported fuel oil. Petroleum and petroleum products are without question items in interstate and foreign commerce. Petroleum is currently our major energy source. If alternative energy sources are developed that reduce our dependence on petroleum, then they will have an "effect" on commerce by altering the demand for petroleum. Even alternative energy sources that are totally intrastate affect interstate commerce by reducing the demand for petroleum and thus altering the marketing conditions for and the transportation of this item of interstate and foreign commerce.

In Hawaii, for instance, 92 percent of the electric energy is produced from petroleum imported to Hawaii. If PURPA is successful in promoting the development of alternative energy resources within Hawaii—as is being demonstrated (see below, Argument, Section VI)—then this state will need to import less petroleum and the nation's overall dependence of foreign petroleum will be reduced. Thus, alternative energy production in Hawaii will have an effect on foreign and interstate commerce through its effect on the importation of fuel oil.

Second, the "connection between the regulatory means selected and the asserted ends" is clear and compelling. As explained in the preceding section, Section 210 (16 U.S.C. 824a-3) seeks to encourage the development and use of alternative energy sources so as to reduce our national dependence on imported petroleum and conserve our own national supplies of petroleum.

The District Court's decision striking down PURPA relied on *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The basis for the *Carter Coal* decision—that certain "local" economic matters were beyond Congressional power—was essentially rejected by the Supreme Court only one year later in *NLRB v. Jones & Laughlin Steel Corp., supra,* 301 U.S. at 37. The current rule is that Congress's commerce power "exends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Hodel v. Virginia Surface Mining & Reclamation Assoc., supra,* 49 U.S.L.W. at 4658, quoting from *United States v. Wrightwood Dairy Co., supra,* 315 U.S. at 119. Regulations respecting the generation of electric energy by alternative fuel sources may deal with activities affecting interstate commerce even if the electricity is utilized only within a state because the alternate fuels used in such generation displace imported fuel oil, and thus Congressional supervision is appropriate and constitutionally authorized.

II. THE FOREIGN AFFAIRS POWER.

Congress also has constitutionally authorized power to legislate in areas related to the nation's needs in the foreign affairs area (U.S. Const., Art. I, Sec. 8, Cls. 3, 5, 10, 11, 12, 13, 14, 15, and 16). This power is not unlimited, but it is an important source of legislative power particularly in times of international tension. In Section 2 of PURPA (16 U.S.C. 2601), Congress declared that the conservation and the increased efficiency in the use of energy were required for "the preservation of national security." As explained in the Description of the Statute, *supra,* national security is clearly a major purpose of PURPA because our substantial and increasing national dependence on imported foreign petroleum was reducing our economic strength, straining our balance

of payments, reducing the value of our currency, and making us vulnerable to boycotts, cut-offs, and economic retaliation by oil exporting countries. This problem could increase the likelihood of armed conflict and weaken our prospects in such a conflict.

The same types of questions can be asked to test legislation under this power as were asked in the interstate commerce area:

(1) Was Congress rational in its determination that the activity regulated affects our national interests in dealing with other nations? Certainly, energy has become a major concern in international dialogue and controversy.

(2) Is the statute reasonably related to the goals Congress seeks to attain? Yes, reducing our dependence on foreign petroleum by developing domestic alternative energy sources strengthens our position in dealing with foreign nations.

PURPA is therefore also constitutional as an exercise of this foreign affairs power.

III. THE TENTH AMENDMENT DOES NOT LIMIT CONGRESS'S POWER TO ENACT PURPA.

In its decision striking down portions of PURPA, the District Court also relied on the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and its overruling of *Maryland v. Wirtz*, 392 U.S. 183 (1968). Both of these cases involved federal regulation of the direct activities of a state government as an employer. The decision in *National League of Cities* establishes the proposition that the Tenth Amendment prohibits federal regulations that "displace the States' freedom to structure integral operations in areas of traditional governmental functions" (426 U.S. at 845). As the decision in *Hodel v. Virginia Surface Mining & Reclamation Assoc., supra*, 49 U.S.L.W. at 4660, makes clear, however, the decision in *National League of Cities* applies only to federal statutes that regulate the "States as States." PURPA

does not regulate the "States as States." Instead it is designed to encourage private companies to provide electric energy from alternative sources that will then be made available to the general public through electric utilities, in lieu of energy that would have to be produced from fuel oil. The statute requires FERC to promulgate rules to encourage the development of alternative energy sources, and provides that these rules shall govern throughout the nation. It does, therefore, replace state regulatory authority with federal regulatory authority in a specific field affecting commerce which Congress has determined requires a national approach. Nothing in the *National League of Cities* decision prevents Congress from taking such a step. This Court clarified this matter in *Hodel v. Virginia Surface Mining & Reclamation Assoc.*:

> The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers . . . . It would therefore be a radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity. Nothing in *National League of Cities* compels or even hints at such a departure.

(49 U.S.L.W. at 4661.) The Tenth Amendment does not, therefore, prevent Congress from enacting a statute like PURPA that primarily is aimed at regulating private commercial activity.

The foreign affairs power is also limited by Tenth Amendment considerations if some interest essential to a state's sovereignty is involved. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (dictum). This Court has nonetheless on numerous occasions upheld federal action taken for military and foreign policy reasons to intrude into areas that might arguably be thought to be within the domain of the states; the Tenth Amendment would

act as a restraint only if some activity essential to the state's integrity were involved. *See e.g., Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (regulation of alcohol; war powers); *Missouri v. Holland*, 252 U.S. 416 (1920) (migratory birds; treaty power); *United States v Belmont*, 301 U.S. 324 (1937) and *United States v. Pink*, 315 U.S. 203 (1942) (executive agreement; recognition of foreign governments); *Woods v. Miller*, 333 U.S. 138 (1948) (rent control; war powers); *United States v. Oregon*, 366 U.S. 643 (1961) (veteran's affairs); and *Dames & Moore v. Regan*, ... U.S. ....., 49 U.S.L.W. 4969 (July 2, 1981) (*Iran Hostage Settlement Case*).

IV. PURPA ACTS TO REMOVE BARRIERS THAT OBSTRUCT FEDERAL GOALS, AND LEAVES THE STATE REGULATORY AGENCIES AS MUCH DISCRETION AND AUTHORITY AS IS CONSISTENT WITH THE REMOVAL OF THESE BARRIERS.

Appellees may argue that PURPA is unconstitutional because it affirmatively obliges the state regulatory agencies to determine rates in conformance with federal law. They may argue that this statute is different from the statutory provisions upheld in the *Hodel* cases, *supra*, because in *Hodel* the states could relinquish all authority to the federal government whereas with respect to Section 210 the state regulatory agencies are obliged to accept the federal standards and, to that extent, to cooperate with the federal government.

In the structure of these statutory schemes, this difference does exist, but certainly for constitutional purposes the approaches are the same. In both situations, Congress has identified a national problem related to interstate commerce which may involve intrastate activities. However, in PURPA, Congress chose not to exercise complete regulatory authority. Instead, Congress elected to give the states as much of a continuing role as possible, and, in fact, if local needs so dictate, the states may require utilities to pay rates higher than the "avoided cost" minimum specified in PURPA. It thus asked the states to consider certain federal

policies in Titles I and III and requires them to remove certain barriers to the development of alternative energy sources in Section 210 of Title II. In other respects, the state is free to operate as local needs dictate and the published regulations give the states considerable discretion in deciding how to implement the federal policies. *See* 18 C.F.R. 292, 401(b) (1980).

A useful analogy can be found in the nuclear power field. Congress has established the Nuclear Regulatory Commission which has established federal safety standards for nuclear plants, and thereby has preempted this aspect of the field. *See* Atomic Energy Act, 42 U.S.C. 2011, *et seq.*; Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 et. seq. (Dec. 23, 1980). The states are prohibited from imposing stricter safety standards, because to do so would be to erect barriers impeding the development of nuclear power in accordance with the federal goals and standards. *Northern States Power Company v. State of Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd,* 405 U.S. 1035 (1972). The states are also forbidden from stopping the interstate transportation of and storage of nuclear waste in their borders. *Washington State Bldg. & Construction Trades Council AFL-CIO v. Spellman,* Nos. C-81-154 RJM and C-81-190 RJM (E.D. Wash., June 26, 1981). The states nonetheless still regulate the energy produced by the nuclear plants and play an important role in supervising the distribution of the energy. The federal government has preempted one aspect of a field affecting interstate commerce and has restricted the freedom of the state regulatory agencies in this respect. It has not interfered with the states' sovereignty, however, or interfered with a matter essential to the states' integrity in a way that would raise a Tenth Amendment issue.

These are matters which require a "balancing approach", as Justice Blackmun wrote in casting his deciding vote in *National League of Cities v. Usery, supra,* 426 U.S. at 856. That decision, he wrote, "does not outlaw federal power in areas . . . where the

federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* Such is the case with PURPA which was enacted in response to considerations of national security and economic stability. PURPA is thus much closer to the wage-price control statute upheld in *Fry v. United States,* 421 U.S. 542 (1975), because of the emergency situation that motivated Congress to enact the statute, than to the wages and hours law struck down in *National League of Cities.*

V. THE TENTH AMENDMENT DOES NOT BAR THIS CONGRESSIONAL REGULATION EVEN WHEN IT REGULATES MUNICIPALLY-OWNED UTILITIES.

It might be argued that under the decision in *National League of Cities, supra,* the Tenth Amendment would restrict federal regulation as applied to a utility that was governmentally owned and operated. A close reading of the *National League* decision indicates, however, that the Court did not intend such a result. The test articulated in *National League of Cities* is as follows:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations *in areas of traditional governmental functions,* they are not within the authority granted Congress by Art. I, § 8, cl. 3.

(426 U.S. at 852) (emphasis added). This case itself involved the wages and hours of governmental employees, and the decision turns on what is considered to be federal intrusion into the states' structuring of their own essential services. Just prior to the holding quoted above, the Court states:

> [The federal amendments will] significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of adminis-

> tering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, *services such as these which the States have traditionally afforded their citizens.*

(426 U.S. at 851) (emphasis added). The opinion in *National League of Cities* thus limits its holding to "traditional" governmental functions. The opinion does not describe these functions in great detail, but Justice Rehnquist—the author of the 5-4 majority opinion in the *National League of Cities* case—elaborates on this question in his dissent in *Fry v. United States, supra,* at 549. In a long discussion that appears to lay the foundation for the decision in *National League of Cities,* Justice Rehnquist analyzes at length the earlier holding in *United States v. California,* 297 U.S. 175 (1936). In that case, the Court held that the State of California, in operating a railroad wholly within its own boundaries, was subject to the regulations of the Federal Safety Appliance Act, a statute passed under Congress's commerce clause power. Justice Rehnquist's dissent argues that the reasoning of *United States v. California* is flawed—because it refuses to provide any protection for the states as separate sovereign entities—but he nonetheless concludes that its holding is correct, because California was not operating in a "traditional" governmental area when it was running a railroad:

> I would hold that *the activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State* that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in *Maryland v. Wirtz* is an activity sufficiently closely allied with traditional state functions that the wages paid by the State to employees of such facilities should be beyond Congress' commerce authority. Such a distinction would undoubtedly present gray areas to be marked out on a case by case basis, as is true in applying any number of other constitutional principles. But today's case, in which across-the-board wage and salary

> ceilings are sustained with respect to virtually all state employees, is clearly on the forbidden side of that line.

(421 U.S. at 557-58) (emphasis added). Justice Rehnquist distinguishes between (1) economic activities that governments may occasionally become involved in but which are usually left to the private sector, and (2) public service activities that do not usually generate a profit and are generally provided by governments for the public welfare. Electric utilities are usually privately-owned in the United States and are similar to railroads in the dichotomy that Justice Rehnquist develops. Approximately 78 percent of retail electric sales in the United States are made by private investor-owned utilities, 11 percent by federal utilities, 9 percent by non-federal public utilities, and 2 percent by cooperatives. S. Rep. No. 95-442, *supra,* at 7. Most utilities are owned by shareholder-investors. Certainly the operation of utilities do not involve "traditional" governmental activities in the sense of schools and hospitals, and hence should not be covered by the reasoning and holding of *National League of Cities.* (The opinions in *New York v. United States,* 326 U.S. 572 (1946), also support this type of distinction.)

VI. PURPA HAS ALREADY BEEN SUCCESSFUL IN ACHIEVING CONGRESS'S GOAL OF ENCOURAGING INVESTORS TO DEVELOP ALTERNATIVE ENERGY SOURCES TO REDUCE OUR DEPENDENCE ON IMPORTED FUEL OIL.

As noted, Section 210 of PURPA, and the regulations thereunder (18 C.F.R. part 292 *et seq.*) are designed to reduce our country's dependence on foreign fuel oil. To accomplish this goal, Section 210 removes disincentives to the development of alternate energy production facilities that otherwise might exist because of regulations imposed by the federal government or by the states. Next, Section 210 imposes affirmative obligations on utilities to disclose system cost data, and, most significantly, to purchase energy from "qualifying facilities" as defined by Section

201 of PURPA. Rates for purchases from qualifying facilities, the construction of which commenced on or after November 9, 1978, must be at "avoided cost"; i.e., at rates equal to the incremental costs the utility would have incurred in generating or purchasing the electric energy but for the purchase of the energy from the qualifying facility. A qualifying facility is entitled to receive not only an avoided cost rate for the energy it delivers, but also an avoided cost price for the capacity it supplies if the utility, by reason of the availability of capacity from the qualifying facility, is able to avoid or defer construction of additional generating facilities.

The effect of removing utility-type regulation of a qualifying facility will vary, first, upon the nature and extent of a utility's operations and, second, upon state law. For example, the activities of particular utilities may not be subject to regulation under the jurisdictional limits fixed by Congress in the Federal Power Act. Additionally, a state may have already provided by state statute that it should not regulate as a utility certain facilities providing electric energy to regulated utilities for resale to consumers. *See* Hawaii Revised Statutes § 269-1 (1981 Supp.). In summary, although the PURPA exemptions from federal and state regulation do encourage alternate energy production and the displacement of fuel oil, the extent of this encouragement is a function of the particular utilities' activities and applicable state law.

However, unlike the regulatory exemptions, the affirmative mandates of Section 210 will encourage the development and use of alternate enregy resources to displace fuel oil on a nationwide basis. In effect, under PURPA, a prospective alternate energy developer is assured of a utility market for its energy so long as there is fossil fuel to displace. Further, using the cost data which PURPA requires the utility to make available, a prospective developer can determine the value of an alternate energy delivery system to the utility. Any number of different alternate energy delivery systems can therefore be financially evaluated. The net

result is that those alternate energy delivery systems which, on analysis, prove to be financially viable, are likely to be implemented.

The effects of PURPA in Hawaii have been quite dramatic. Since 1978, the corporate parent companies for most of the major sugar producing companies have either created separate energy departments or assigned specific executives to oversee energy concerns. (Interviews with: W. Garvie Hall, Manager, Plantation Department, Theo. H. Davies & Co., Ltd., in Honolulu, Hawaii (August 13, 1981) (hereinafter cited as Hall interview); Sach Masumoto, Chief Staff Engineer, Alexander & Baldwin, Inc., in Honolulu, Hawaii (August 14, 1981) (hereinafter cited as Masumoto interview); Jerry E. Allen, Vice President, Energy Research and Development, C. Brewer and Company, Limited, in Honolulu, Hawaii (August 13, 1981) (hereinafter cited as Allen interview); George E. St. John, Vice President, Energy Development and Engineering, Amfac Sugar Division, Amfac, Inc., in Honolulu, Hawaii (August 13, 1981) (hereinafter cited as St. John interview); and Tyrus Chang, Director of Financial Services, Waialua Sugar Company, Inc., in Honolulu, Hawaii (August 12, 1981) (hereinafter cited as Chang interview)).

In addition to surveying the biomass fuel potential associated with existing sugar processing operations, these energy departments and executives are also exploring the development of other alternate energy resources under the market assurances afforded by PURPA.

For example, some 249,864 acres of land was utilized by Hawaii's fifteen sugar companies in 1980 in connection with the growing and processing of sugarcane. (*Sugar Manual* 9 (HSPA, 1981)) The size of this acreage above has justified intensive, PURPA-motivated investigations into the non-biomass energy potentials of this land. Since PURPA's enactment in November 1978, Hawaiian sugar companies have initiated reviews of twelve potential hydroelectric installations which, if completed, could

produce 89,000,000 kilowatt hours (kwh) of electricity per year. Seven such sites have been identified on the Island of Kauai, two on the Island of Hawaii and three on the Island of Maui (St. John, Hall, Masumoto, and Allen interviews). One project on Maui providing 2,500,000 kwh annually will be completed by Hawaiian Commercial & Sugar Company in March 1982 (Masumoto interview). A facility at Olokele Sugar Co., Ltd. on Kauai, which will supply about 6,000,000 kwh annually, is scheduled for completion in 1981 (Allen interview). Other hydroelectric projects are in various stages of planning, funding or construction (St. John interview).

Using a conversion factor of 500 kwh for one barrel of fuel oil, the 89,000,000 kwh per year is equivalent to a saving of 178,000 barrels of fuel oil per year if all of the hydroelectric potential could be developed.

Oahu Sugar Company, Limited on Oahu is participating in a joint venture to produce electricity from the burning of Honolulu's municipal solid waste in conjunction with sugar factory operations. It is anticipated that this facility will produce 300,000,000 kwh of electricity per year (St. John interview). Using the conversion factor described above, this facility would displace 600,000 barrels of fuel oil annually.

Hawaiian sugar companies are also investigating the potential of wind energy conversion systems on various islands. Such systems would be in addition to the PURPA-motivated wind energy project currently being developed on Oahu by Windfarms Ltd. The electricity purchase agreement between Windfarms Ltd. and Hawaiian Electric Company, Inc. has been approved by the Public Utilities Commission of the State of Hawaii. This project, upon completion, is expected to provide approximately 400,000,000 kwh per year of electricity, or about 8 percent of Oahu's annual electricity demand, thus displacing some 800,000 barrels of oil annually. (Interview with G. A. Sumida, attorney for Windfarms Ltd., in Honolulu, Hawaii (August 19, 1981.)).

Section 210 has created a potentially viable utility market for energy produced from geothermal resources in the Puna District on Hawaii. A formal Request for Proposals has been initiated by Hawaii Electric Light Company, Inc. and, because of the market assurances provided by PURPA, several prospective geothermal energy developers are responding. One sugar company is participating in this project and may devote part of its land to geothermal development (St. John interview). Depending on the magnitude of this resource, its development costs and the economic and technical feasibility of an undersea cable linking the islands, the certainty of an avoided cost utility market under PURPA provides a substantial basis for making geothermal energy a major source of electricity throughout the State of Hawaii.

Since PURPA was enacted, sugar companies' executives have become increasingly concerned with improvements to their existing factory generating systems utilizing the bagasse fuel produced in connection with the processing of sugar. In 1980 approximately 3,000,000 short tons of bagasse was potentially available for use as boiler fuel (Hall interview). One ton of bagasse equals one barrel of fuel oil, and so about 3,000,000 barrels of fuel oil on an annual basis (Hall interview). Traditionally, sugar factories have not been operated in a thermally efficient mode with respect to the production of electric energy, especially with respect to the production of energy beyond the needs of the particular factory. Although prior to PURPA Hawaiian utilities were willing to purchase such excess energy, and a number of purchase agreements were in effect, the rate that resulted from such negotiations was not sufficient to provide any substantial incentive to expand electric energy production.

Some of these agreements for the sale of power involve commitments for "firm energy" and "firm capacity", other agreements provide for the sale and purchase of "surplus energy". Generally under "firm energy contracts" energy and capacity are made available to the utility in committed amounts at utility dispatch,

i.e., under circumstances where the utility can rely on energy deliveries and can match the delivered energy to the varying system demands. Under "surplus energy contracts" energy is only introduced into the utility grid on an "as and when available basis".

Because of the market certainties that PURPA provides, a number of sugar factories have completed improvements which enable the factory to deliver increased amounts of energy on a firm energy basis rather than on a surplus energy basis. One firm energy contract negotiated since PURPA and approved by the Public Utilities Commission of the State of Hawaii is between Hawaiian Commercial & Sugar Company and Maui Electric Company Limited and provides 52,000,000 kwh of firm energy to the utility grid on Maui. Fuel oil displaced will approximate 104,000 barrels each year. But for PURPA, energy sales would have been on a surplus basis and would not have approached the amounts provided for in the agreement (Masumoto interview).

Another firm energy contract is presently under negotiation between Theo. H. Davies & Co., Ltd. and Hawaii Electric Light Company, Inc. and will provide 50,000,000 kwh of firm energy on Hawaii displacing some 100,000 barrels of fuel oil annually (Hall interview).

Other sugar factories are considering investments to increase energy production through the installation of new turbogenerators (Allen interview). Systems are also being developed to improve the quality of the available biomass fuel through further drying, mechanically or thermally, using waste heat (Allen, Hall, and Masumoto interviews). A dehydrating and pelletizing operation has been installed at the Theo. H. Davies & Co., Ltd. factory on Hawaii (Hall interview). If successful, this latter system will mean that biomass fuel can be stored on a long-term basis and firm energy can be supplied to the utility grid fifty-two weeks of the year. Other sugar companies are considering various processes to improve the storage qualities of bagasse fuel (Masumoto interview).

These are but a few examples of PURPA's impact in the State of Hawaii, and it is reasonable to assume that PURPA is serving to stimulate alternate energy production in a similar fashion throughout the nation. The grave national concern over the nation's dependence on foreign fuel oil is being met in part through Section 210 of PURPA. Actual experience in Hawaii, as indicated by the hundreds of thousands of barrels of fuel oil per year dramatically demonstrates the rational connection between the regulatory means which Congress selected in adopting Section 210 and the national goal of reducing the nation's dependency on foreign petroleum.

CONCLUSION

For the reasons outlined above, PURPA is a constitutionally valid and rational exercise of Congress's power with respect to interstate and foreign commerce that does not threaten state sovereignty, and, thus, the decision in the District Court below should be reversed.

Respectfully submitted,

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